

RICHARD M. ZELMA
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**Richard M. Zelma
Plaintiff**

vs.

**SUNPOWER, a FOREIGN PROFIT
CORPORATION;
and, GENRENEW LLC; a New Jersey
LIMITED LIABILITY COMPANY;
and, CHRISTOPHER S. SABIN SR., as
MANAGING MEMBER
and, MICHAEL MULLEN as
MANAGING MEMBER
and, TELEMARKETERS calling from
LOCAL SPOOFED N.J. NUMBERS and
Does' (1-5) and ABC Corporations' (1-5);
each acting individually, in concert or as a
group.**

DEFENDANTS'

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

CIVIL ACTION NO. 2:19-cv-20542

**BRIEF OF RICHARD M. ZELMA IN SUPPORT
OF PLAINTIFFS OPPOSITION TO
DEFENDANTS MOTION TO DISMISS**

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OPPOSITION TO DEFENDANTS MOTION TO DISMISS**

Plaintiff Richard M. Zelma, *pro se*
On the Brief

1 Plaintiff Richard M. Zelma submits this Brief in Opposition to the Defendants
2 Motion to Dismiss and challenges the claims made by the defendants and supportive
3 papers.
4

5 Plaintiff has been a consumer privacy advocate for 26 years. As such, being
6 opposed to the plethora of telemarketing calls and the increase in unlawful robo calls,
7 Plaintiff has taken the tools afforded him by Congress, mainly The Telephone
8 Consumer Protection Act of 1991 (TCPA), and has used that as intended, to stop and
9 deter those willing to thwart the law by bring such matter to Court.
10

11 Ironically, the Defendants don't like that; an ordinary individual having no
12 legal training can bring suit against someone for breaking the law. And in showing
13 their hatred for such matter, devoid of no actual defense to the allegations in
14 Plaintiffs Complaint, the Defendants resort to the only response available, to defame
15 the name of Plaintiff by resorting to name calling such as "Serial Plaintiff" or "Serial
16 Filer."

17 While the TCPA was implemented to protect and be used by the 'ordinary'
18 consumer; where its terms for violations are "monetary damages" in "hope of"
19 deterring continued wrongdoing, not once does the TCPA state where a plaintiff can
20 bring only one suit in a lifetime.
21

22 The never ending bombardment of daily unwanted calls continue. Congress did
23 not intend the consumer become a powerless victim, barred from further legal action.
24 (See, E.g., Cunningham, 251 f. Supp. 3d At 1195 - 96 ("the Statutory damages
25

1 available under the TCPA are, in fact, specifically designed to appeal to Plaintiffs'
2 self interest and to direct that self interest toward the public good: 'like statutory
3 compensation for whistle-blowers,' they operate as bounties, increasing the incentives
4 for private Enforcement of law.' . . . While these schemes do not eliminate the
5 constitutional requirement of Injury-In-Fact, neither do they impose an additional
6 hurdle simply because the plaintiff may have a motive beyond mere compensation for
7 his injury."); Id. At 119 5 (" Nothing in the constitution . . . requires a plaintiff to be
8 a naïf. Litigation is not college athletics. There is no 'amateurs Only' Rule. ").

9 In a failed attempt to support their name calling, the Defendants resort to "an
10 article" in the (Fake News) New York Times from 1999, in which reporter (Debra
11 Galant) called plaintiff after seeing one of his filed suits, wanting to know the ins and
12 outs of suing a telemarketer. While Plaintiff clearly stated he is not an attorney and
13 cannot offer any advice, legal or otherwise, he encouraged the reporter to simply look
14 up the law and go from there.

15
16 The reporter was not satisfied, continued to inquire about the law and Plaintiffs
17 history, where Plaintiff simply said, "I cannot comment", again referring her to look
18 up the law. Not being aware that the short interview would become news, Plaintiff
19 was called by a relative several weeks later informing him of the story.

20 Plaintiff reached out to that reporter to inform her that none of the claims were
21 true, such as "making enough money to buy a small yacht". Ms. Galant agreed to that
22 and other manufactured claims in the article. However responding to plaintiff, "I had
23 to spark interest in the reader, I'm looking for a good juicy story!"
24
25

1 With that and despite the fact not one statement parroted from that article by
2 the defense is true, the reporter refused to take it down but nonetheless, the defense
3 swears to its accuracy. (SEE: Certification of attorney Freijomil)

4 The Defense applies the foregoing prevarication, to defend the clients unlawful
5 actions and how they believe no violations took place. Likewise, the Defense
6 expounds on their belief that Plaintiff is a serial litigator while ignoring the fact they
7 are serial violators! (Defendants EXHIBIT 1)

8 Plaintiff has history with defendant SunPower and their use of “dealers and
9 sub-dealers” as they call them. In July 2018, Defendant SunPower and a different
10 dealer entered into a settlement agreement with Plaintiff to avoid the perils of
11 potential litigation. Additionally, while PACER has a municipality of filed complaints
12 against SunPower, which need not be repeated here, it should be noted where the
13 abundance of evidence thereto is that SunPower has no Federal Required compliance
14 procedures in place, neither does its dealers, hence creating SunPower and its dealers
15 litigation history.
16

17 **PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS**

18
19 Plaintiff submits this memorandum in opposition to the Motion to Dismiss and
20 supporting memorandum filed by Defendants SunPower and GenRenew (“the
21 Motion”).

22 **OVERVIEW**

23 This suit is based on the Telephone Consumer Protection Act (47 U.S.C. 227;
24 “the TCPA”) and common law civil conspiracy, for autodialed telemarketing calls.
25

1 Plaintiff contends that Defendants collaborated in an effort to disseminate their
2 “products and services” via [tele]marketing calls to thousands of homeowners without
3 their express prior consent or invitation as required under the TCPA.

4 The purpose of the calls were to inquire if the called party knew about solar
5 energy, thus “selling” the idea of free energy. In some instances the callers were lead
6 generators or call centers working directly, hired by or under contract with the
7 defendants and each of them.

8 Defendants used databases of home owner numbers, including list from
9 database brokers to target the most fertile recipients. This enabled Defendants to
10 “avoid” calling tenants, renters or transients. Although the allegations are sufficient
11 to survive the Motion, discovery is expected to illuminate the participation by each
12 member of the consortium. The argument is also premature, since Plaintiff has not
13 had an opportunity to obtain discovery from the Defendants on the very facts they
14 rely upon in their argument on this point.¹ The allegations of agency and conspiracy
15 among the defendants, described below, are more than adequate to overcome this
16 argument.
17

18 Plaintiff will likewise explore the Defendants claim; “they were not marketing
19 a product or service” when discovery of the critical facts at issue is obtained. At
20 present, the Defendants rely on its motion to dismiss thus avoiding discovery.

21 STATEMENT OF FACTS

22

23
24 ¹ As the Motion is only to test the adequacy of the pleadings, specific
25 evidence supporting Plaintiff’s allegations will be presented when the case is
ripe for such presentation.

1 The Defense argues they only called Plaintiff to discuss "alternative energy".
 2 (Compl. ¶46.) The defense fails to admit the caller refused to provide any identity to
 3 themselves. (Compl. ¶47) Moreover, the defense fails to address the spoofed caller ID
 4 in which the good name of PSE&G was used as the caller.

5 And while the defense is under some belief where Plaintiff is required to notify
 6 an unknown, unidentified unlawful caller that he does not wish to receive these calls,
 7 Plaintiff is relieved of such obligation by the TCPA and his placing his number on the
 8 FTC registry in 2003.²

9 Courts that have considered whether a plaintiff has a duty to mitigate damages
 10 under Section 227 of the TCPA, finding: **there is no such duty!** See Holtzman v.
 11 Turza, No. 08 C 2014, 2010 WL 3076258, at *5 (N.D.Ill. Oct. 29, 2010); Fillichio v.
 12 M.R.S Associates, Inc., No. 09-612629-CIV, 2010 WL 4261442, at *5 (S.D.Fla. Oct.
 13 19, 2010); State ex rel. Charvat v. Frye, 114 Ohio St.3d 76, 868 N.E.2d 270, 275
 14 (2007); Manuf. Auto Leasing, Inc. v. Autoflex Leasing, Inc., 139 S.W.3d 342, 347
 15 (Tex.Ct.App.2004); Onsite Computer Consulting Svs., Inc. v. Dartek Computer Supply
 16 Corp., No. 05AC-000108 I CV, 2006 WL 2771640, at *4 (Mo.Cir. May 17, 2006);
 17 Jemiola v. XYZ Corp., 126 Ohio Misc.2d 68, 802 N.E.2d 745, 750 (2003).

18 A plaintiff alleging a violation under the TCPA "need not allege any additional
 19 harm beyond the one Congress has identified." Van Patten v. Vertical Fitness Grp.,
 20
 21

22 ² The Telephone Consumer Protection Act of 1991, 47 U.S.C. §227; 47
 23 C.F.R. §64.1200; the Report and Order, FCC Document 92-443 et seq., (hereinafter
 24 the "TCPA"); prohibits telemarketing to residential telephone subscribers, unless,
 25 such entity engaged in telemarketing is in compliance with the Statutory [See 7
 FCC Red 8752,8763-8765 (1992)]Requirements and Minimum Standards of the TCPA. 47
 C.F.R. §64.1200 (e)(2)et seq.

1 No. 14-55980, 2017 U.S. App. LEXIS 1591, at *12 (9th Cir. May 4, 2016)(quoting
2 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (emphasis in original)).

3 If in fact, the defendants were complainant with Federally regulated
4 telemarketing procedures, and had the defendants subscribed to the no-call-registry as
5 required by law, the calls would never have occurred. Such registry provides the
6 marketers, call centers and lead generators with a database of numbers to input into
7 their dialers or contractors dialers, making it impossible to ever call Plaintiff's
8 phone. Not one of the defendants ever subscribed to the do-not-call registry.

9 Furthermore, while the Defendants and each of them believe Plaintiff is not
10 entitled to identify a caller refusing to meet the the required identification
11 compliance procedure upon reaching a proposed target, they add to their failing
12 defense that [the] Defendants were not selling "products, goods or services". (In the
13 Matter of Rules and Regulations Implementing the Telephone Consumer Protection
14 Act of 1991; CG Docket No. 02-278; The majority of consumers and consumer groups
15 contend that messages offering "free" goods or services or those that claim to provide
16 information-only are designed with the ultimate goal of soliciting consumers to buy
17 products and services and are therefore prohibited without the prior express consent
18 of the called party. These messages, they argue, are intended to generate future sales,
19 and the fact that no sale occurs during the call is irrelevant to their intrusiveness.
20

21 Plaintiff will address the Defendants argument below.
22

23 **PLAINTIFF'S STATE LAW CLAIMS (COUNTS ONE AND THREE) SHOULD**
24 **NOT BE DISMISSED BECAUSE PLAINTIFF IDENTIFIED AN**
25 **ASCERTAINABLE LOSS**

1 A. Plaintiff has alleged multiple elements of unlawful conduct by the
2 defendants leading to an ascertainable loss defined by the CFA. A casual, consumer
3 or even professional relationship between plaintiff and defendants has never existed.

4 The Defendants mislead this Court by improperly claiming that a CFA violation
5 is created through the sale of merchandise or services. This is simply not true. The
6 CFA, N.J.S.A. §56:8-119 addresses “do-not-call” violations. The gravamen of the
7 within dispute does not argue “the sale of merchandise or services” but rather the
8 initiation of unwanted prohibited marketing calls.

9 B. The defense quotes a reference to a unrelated case; *Zelma v. Konikow*.
10 This case was won on appeal, it relates to the submission of unsolicited faxes and
11 should not be relied upon in their brief. And as defined within Charge 4.43
12 CONSUMER FRAUD ACT (Approved 5/1998; Revised 12/2011); A private right of
13 action under the Consumer Fraud Act was added by amendment in 1971 without
14 providing for jury trials.
15

16 **PLAINTIFF ALLEGES TCPA CLAIMS**

17 A. The defendants admit violations to Count Two. Plaintiff received seven
18 (7) calls, within a twelve month period. Each call was unlawful. Each call violated
19 §227(c)(5) by calling a number on the federal and state no-call list. (Compl. ¶99).
20 Plaintiffs claim does not fail insofar as the defendants allege they were not offering
21 goods or services. Each of the defendants are not exempt organizations. Therefore,
22 the calls themselves are violations.
23
24
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1 While the defendants agree the calls were considered telephone solicitations, by
2 law, the callers are required to fully identify themselves under the TCPA. Plaintiff is
3 entitled that right. He is entitled to know the party initiating the annoying calls and
4 in some situations, where the callers refuse to do so, the only way is to invite the
5 alleged "someone else" to call back. In doing so, plaintiff succeeded in identifying
6 those responsible for the subject calls.

7 **B.** In Count Four of Plaintiffs complaint, a violation of the caller ID of the
8 TCPA, is also considered a crime. When President Obama signed 47 C.F.R.
9 §64.1601(e) into law, it was deemed a felony to spoof caller ID. As promulgated
10 under 47 U.S.C. §227(c), Plaintiff is entitled a private right of action as he is entitled
11 to for any other violation under §227.

12 Plaintiff alleges the defendants used an automatic telephone dialing system
13 (ATDS) to initiate the calls. Plaintiff does not seek damages for the ATDS use
14 therein. Defendants are confused.

15 The use of an ATDS forms a *corrogiatio* of the defendants in this consortium.
16 Through discovery, plaintiff will demonstrate how defendant GenRenew acted in
17 concert with defendant SunPower to disseminate their products and services.
18 Plaintiff will show through defendants phone records and sales agreements where the
19 use of an overseas call center and an ATDS was used to initiate the unlawful calls
20 while hiding the actual identity of the principals behind the calls.
21
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1 Plaintiff believes and thereby avers where the known defendants instructed and
2 directed the yet unknown overseas entities to avoid identifying themselves and
3 others until and unless the called party showed interest in the[ir] offering.

4 Defendant SunPower is alleged to manufacture solar panels. Defendant
5 GenRenew is alleged to be a master dealer for SunPower. The scheme of their calls
6 was to interest a home-owner in obtaining free electricity or at best, little cost.
7 Eventually the defendants "inquiry about alternative energy" would in fact, lead to
8 the offer of products, goods or services from the known defendants.

9 C. As a result of the defendants willful or knowing initiation of marketing
10 calls to Plaintiff, by their willfully spoofed calls, by their failure to register and
11 subscribe to the federal and state no call list, Plaintiff is entitled to statutory trebled
12 damages.
13

14 CONCLUSION

15 It should first be noted; the within matter was agreed to settlement in principle
16 on or about January 6, 2020. During that time, Mr. Freijomil would not send
17 supportive documents, claiming "the matter takes time." At that same time, untrue
18 negative descriptions surfaced with defaming statements from (Defendant) co-counsel
19 John D. Coyle.
20

21 When Plaintiff addressed the matter, and after repeatedly asking for settlement
22 papers, Mr. Freijomil claimed that Plaintiff paused the process. To date and at the
23 time of this writing, Plaintiff has not received any papers testifying to a settlement.
24
25

1 For the foregoing reasons, Plaintiff respectfully requests This Court to deny the
2 defendants motion to dismiss in its entirety, thus allowing Plaintiff to proceed with
3 appropriate discovery in the matter.

4 Alternatively; since the defense alludes to Plaintiff not having Article III
5 Standing (Def. Brief, Mtn. to Dismiss, pg 13) and if This Court believes Plaintiff
6 lacks Article III Standing under the Constitution, Plaintiff respectfully request that
7 the within matter be Remanded back to State Court.

8 Respectfully submitted;

9
10 

11 Richard M. Zelma
12 PLAINTIFF, *pro se*

Dated: January 17, 2020

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